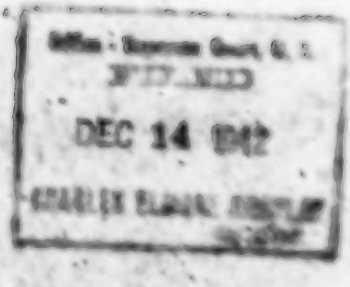
FILE COPY



No. 269

In the Supreme Court of the United States

OCTOBER TERM, 1942

MARGARET M. BRADY, AS ADMINISTRATRIX OF JAMES P. BRADY, DECEASED, PETITIONER

v.

ROOSEVELT STEAMSHIP COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 269

MARGARET M. BRADY, AS ADMINISTRATRIX OF JAMES P. BRADY, DECEASED, PETITIONER

v.

ROOSEVELT STEAMSHIP COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE.

In *Johnson* v. *Fleet Corporation*, 280 U. S. 320, this Court held that no suits on maritime causes of action could be brought against the United States under the Tucker Act or in the Court of Claims or against the United States Shipping Board Emergency Fleet Corporation or other agents of the United States in state or federal courts, and that the Suits in Admiralty Act (46 U. S. C. 741–752) provided the exclusive remedy.[1]

[1] The doctrine of the exclusiveness of the remedy afforded by the Suits in Admiralty Act is discussed in the Government's brief in *Clyde-Mallory Lines* v. *Steamship Eglantine and United States*, No. 265, this Term, argued November 20, 1942.

499738—42

Petitioner contends that the *Johnson* case does not apply where the defendant operator of the ship is a "private operator" and "independent agent" (Pet. 20) to whom the Government is not liable for the judgment to be recovered. The majority of the court below held that the *Johnson* case precluded the maintenance of this suit even though the United States might not be liable by virtue of the agency agreement with the defendant operator for any judgment recovered in this case. The dissenting judge was of the opinion that the controlling test was whether or not the United States was liable and that since, in his opinion, the Government was not liable, this suit could be maintained. Neither the majority nor the dissent doubted that if the Government were liable, this suit could not be maintained and that the remedy under the Suits in Admiralty Act would be exclusive.

We are putting to one side the question of the responsibility of the United States under the agreement in this case for any judgment which might be entered against the respondent, because that question is of subordinate general importance and may not be controlling on the important question before the Court. The important question is whether and to what extent the *Johnson* decision is to be followed in suits against private persons where Government-owned ships are operated through private parties.

It would seem that the *Johnson* decision precludes the instant suit. One of the actions at law

in which judgment was reversed in the *Johnson* decision involved a ship operated by the Consolidated Navigation Company, a private concern, under an agency agreement with the Fleet Corporation (No. 32, October Term, 1929). The suit at law against the Consolidated Navigation Company was held required to be dismissed along with the various other suits brought against the United States and the Fleet Corporation. The agency contract in that case (R. 177–181, No. 32, October Term, 1929) was substantially similar to the contract here involved (R. 34, 36). Whether the Government would have been liable there for the judgment was not explicitly adjudicated by this Court. However, the Court observed that "Directly or *mediately*, the money required to pay a judgment against any of the defendants in these cases would come out of the United States." [Italics supplied.] 280 U. S. at 326–327. There is nothing in the opinion to indicate that this statement was not intended to refer to the judgment against the Consolidated Navigation Company,[1] and the statement would seem to be equally pertinent in this case.

The Court may have had in mind that the joint judgment of the district court against both the private concern and the Fleet Corporation estab-

[1] The district court had rendered judgment against the Consolidated Navigation Company as well as the Fleet Corporation in the sum of $10,226.50 (R. 13, No. 32, October Term, 1929), and the circuit court of appeals had affirmed that judgment (*ibid.*, R. 188). This Court reversed the judgment and remanded the cause with directions to dismiss.

lished that payment would come from the United States; however, it would have been possible to reverse the judgment merely as to the Fleet Corporation, allowing it to stand against the private party. Further, the Court's omission of discussion of the precise question of reimbursement to the private party by the Fleet Corporation, plus its use of the word "mediately," suggests that the Court was thinking not merely of technical legal liability but instead of the impact on the Government which the liabilities of its private agents would have upon its expense of operation as a whole. This approach seems indicated by the Suits in Admiralty Act itself, which subjects the United States to libels *in personam* on the basis of mere ownership, irrespective of agency, for *in rem* liabilities of its vessels (sec. 2).

Moreover, the scope of the Suits in Admiralty Act is based on operation *for* as well as operation *by* the United States (secs. 1, 2; see also the *Johnson* case at pp. 325, 326; 59 Cong. Rec. 1680). Hence it would seem that orthodox principles of agency and of rights of indemnification and reimbursement do not have their usual significance in this connection. While orthodox principles and the terms of the agreement between the Government and the operator will govern their rights and liabilities *inter se*, those principles would appear to be suspended by the Suits in Admiralty Act so far as concerns the remedies available to third persons. The status of the operator, *vis à vis* third parties, would appear to be more like that of the

contractor in *Yearsley* v. *Ross Construction Company*, 309 U. S. 18, than that of the contractor in *Alabama* v. *King & Boozer*, 314 U. S. 1.[3]

In any event, if the *Johnson* case is to be limited, it would seem that the present case should be decided on its narrow facts because the agency agreement involved is not the standard form of agreement in current use by the War Shipping Administration. The question is given current practical importance to the Government by the fact that the General Agency Agreement now in use by the War Shipping Administration contains a sweeping covenant for indemnification by the Government of the General Agents. Article 16 (a) of the standard form of agreement[4] now in use provides:

> ARTICLE 16. (a) The United States shall indemnify, and hold harmless and defend the General Agent against any and all claims and demands (including costs and reasonable attorneys' fees in defending such claim or demand, whether or not the claim or demand be found to be valid) of whatsoever kind or nature and by whomsoever asserted for injury to persons or property arising out of or in any way connected

[3] In the *Yearsley* case, the Court held that an independent contractor engaged by the United States was sufficiently a "representative" of the Government to be immune from liability to third persons in performing its contract. In the *King & Boozer* case, a cost-plus contractor, an agent of the Government only "in a loose and general sense" (p. 12), was held not entitled to the tax immunity of the United States.

[4] Copies of this form of agreement have been filed with the Court.

> with the operation or use of said vessels or the performance by the General Agent of any of its obligations hereunder, including but not limited to any and all claims and demands by passengers, troops, gun crews, crew members, shippers, third persons, or other vessels, and including but not limited to claims for damages for injury to or loss of property, cargo, or personal effects, claims for damages for personal injury or loss of life, and claims for maintenance and cure.

Whatever may be the limitation on it, we submit the *Johnson* case should be applied at least where the Government is ultimately liable to the agent. However, a rule going no further may be unsatisfactory in cases where the Government's ultimate liability depends on questions of degree of fault, questions of construction of particular agreements, and other questions which can be determined only after full trial. Both the principle that the Government's liability to suit should be strictly construed[3] and the legislative history of the Act call for the more definitive rule that the remedy under the Suits in Admiralty Act is exclusive irrespective of ultimate liability of the Government to the agent in a technical legal sense, if

---

[3] As this Court said in discussing the Suits in Admiralty Act in *Eastern Transportation Company* v. *United States*, 272 U. S. 675, 686:

"The sovereignty of the United States raises a presumption against its suability, unless it is clearly shown; nor should a court enlarge its liability to suit beyond what the language requires. * * *"

as a matter of practical business these potential liabilities will add to the Government's costs of operating vessels.

The broader result finds support in the legislative history of the Suits in Admiralty Act, which establishes that the legislation was intended to apply in the case of government vessels operated by private persons. During the debates on the measure, Representative Volstead, its sponsor in the House, expressly so stated (59 Cong. Rec. 1680):

> Mr. WHITE of Maine. Would this bill apply to Shipping Board vessels that are allocated to private concerns and are being operated by private concerns?
>
> Mr. VOLSTEAD. Yes; it covers all ships owned by the Government.

Accordingly, it is respectfully submitted that the *Johnson* decision should be deemed controlling and the remedy under the Suits in Admiralty Act held exclusive, at least where the Government is liable for the judgment, if any, recovered against the operator of the vessel.

CHARLES FAHY,
Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
SIDNEY J. KAPLAN,
Special Assistant to the Attorney General.
ELLIS LYONS,
K. NORMAN DIAMOND,
WALTER J. CUMMINGS, JR.,
Attorneys.

DECEMBER 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942